IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TIMOTHY PHILLIP PENA, Appellant.	)	2 CA-CR 2006-0270 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022182

Honorable Howard Hantman, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Jack L. Lansdale, Jr. — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Timothy Pena was convicted of one count each of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked and aggravated driving with an alcohol concentration of .08 or more

while his license was suspended or revoked. The trial court sentenced him to presumptive, enhanced prison terms of 4.5 years, to be served concurrently with each other and with concurrent sentences imposed in another cause. On appeal, Pena argues that extradition costs were erroneously imposed after oral pronouncement of sentence, and that the jury instructions misstated the law. Finding no reversible error, we affirm.

¶2 We view the facts in the light most favorable to sustaining the convictions. *See State v. Johnson*, 210 Ariz. 438, ¶ 2, 111 P.3d 1038, 1039 (App. 2005). In July 2002, a Tucson Police Department officer saw a sport-utility vehicle (SUV) being driven erratically. The officer followed the SUV, activating the lights on his patrol car, and the SUV eventually stopped in a parking lot. The driver, Pena, initially did not respond to the officer. When Pena did respond, he exhibited symptoms of intoxication. He admitted having had four twelve-ounce beers and being drunk, and he refused to submit to a test of his alcohol concentration. A blood test conducted pursuant to a warrant indicated an alcohol concentration above .24.

¶3 Pena was arrested for DUI. He did not appear at a pretrial status conference, and a bench warrant issued for his arrest. He was tried and convicted in absentia in February 2004. In 2006, Pena was arrested in New York and transported to Tucson. Before sentencing, the trial court held a prior convictions trial, finding Pena had one historical prior conviction. After sentencing, the trial court signed an order granting the state's motion to impose extradition costs.

¶4 Pena first argues that he is entitled to resentencing on the issue of extradition costs. He claims that the trial court should have imposed those costs in open court at the sentencing hearing, not by order following that hearing, and that he had the right to be present. Because Pena did not raise this issue below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 Citing *State v. Cox*, 201 Ariz. 464, 37 P.3d 437 (App. 2002), Pena contends the imposition of extradition costs was an illegal sentence and thus constituted fundamental error. But Pena does not argue that the trial court lacked authority to impose extradition costs or that the amount ordered was erroneous. Accordingly, he has failed to carry his burden to show prejudice, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607, even if an error that could be characterized as fundamental occurred.

¶6 Pena next argues he "is entitled to a new trial because the trial court's instructions misstated the law." We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion, *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), but "[w]e determine de novo whether jury instructions properly state the law." *State v. Tamplin*, 195 Ariz. 246, ¶ 6, 986 P.2d 914, 915 (App. 1999). "A defendant is entitled to a jury instruction 'on any theory reasonably supported by the evidence.'" *Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d at 885, *quoting State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). But "[a] trial court is not required to give a proposed instruction

when its substance is adequately covered by other instructions." *State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997).

¶7 Pena first contends the trial court should have given his proposed instruction that the state had to prove "[t]he defendant had an alcohol concentration of 0.08 per cent or more within two hours of driving or being in actual physical control of a vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle." He argues this instruction more accurately reflects the language in A.R.S. § 28-1381(A)(2).

¶8 But the trial court did instruct the jury that the state had to prove "the defendant had a blood alcohol content of 0.08 percent or more within two hours of driving." All the proposed instruction would have added was the requirement that the alcohol have been consumed before or during driving. And there was no evidence that Pena had been drinking after driving. As noted above, he was approached by a police officer while he was driving and admitted being drunk. The evidence did not support the instruction. Thus the trial court did not err by refusing to give it. *Cf. State v. Doerr*, 193 Ariz. 56, ¶ 36, 969 P.2d 1168, 1177 (1998) (defendant not entitled to "mere presence" instruction "because the evidence did not support it").

¶9 Pena next contends the trial court should have instructed the jury that "[t]he result of any measurement of the defendant's breath, blood, or other bodily substance is not determinative of whether the defendant had an alcohol concentration of 0.08 per cent or more within two hours of driving or being in actual physical control of a vehicle." But Pena

neither cites authority in support of this instruction nor explains why the trial court erred in failing to give it. Therefore, the argument is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S.; *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005). Moreover, the substance of Pena's proposed instruction was adequately covered by the trial court's instruction that the jury was to "determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial." *See Mott*, 187 Ariz. at 546, 931 P.2d at 1056. Accordingly, the trial court did not err by refusing to give Pena's requested instruction.

¶10 For the foregoing reasons, we affirm Pena's convictions. We note that the sentencing minute entry erroneously classifies the offenses as "nonrepetitive," although it properly lists the presumptive, enhanced prison terms of 4.5 years. *See* A.R.S. § 13-604(A). Accordingly, we modify the sentencing minute entry to classify the offenses as "repetitive," *see State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990), and affirm the enhanced sentences as modified.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PETER J. ECKERSTROM, Judge